

JL

99

JS 44 (Rev. 12/07) (cand rev 1-16-08)

CIVIL COVER SHEET

The JS 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. (SEE INSTRUCTIONS ON PAGE TWO OF THE FORM.)

I. (a) PLAINTIFFS

Sierra Club

DEFENDANTS

United States Department of Agriculture,
Rural Utilities Service(b) County of Residence of First Listed Plaintiff San Francisco
(EXCEPT IN U.S. PLAINTIFF CASES)County of Residence of First Listed Defendant
(IN U.S. PLAINTIFF CASES ONLY)
NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE
LAND INVOLVED.

(c) Attorney's (Firm Name, Address, and Telephone Number)

Kristin Henry, Sierra Club
85 2nd Street, San Francisco, CA 94105
415.977.5716

Attorneys (If Known)

II. BASIS OF JURISDICTION (Place an "X" in One Box Only)

- ☐ 1 U.S. Government Plaintiff ☒ 3 Federal Question
(U.S. Government Not a Party)
- ☐ 2 U.S. Government Defendant ☐ 4 Diversity
(Indicate Citizenship of Parties in Item III)

III. CITIZENSHIP OF PRINCIPAL PARTIES (Place an "X" in One Box for Plaintiff and One Box for Defendant)

- | | PTF | DEF | | PTF | DEF |
|---|----------------------------|----------------------------|---|----------------------------|----------------------------|
| Citizen of This State | <input type="checkbox"/> 1 | <input type="checkbox"/> 1 | Incorporated or Principal Place of Business In This State | <input type="checkbox"/> 4 | <input type="checkbox"/> 4 |
| Citizen of Another State | <input type="checkbox"/> 2 | <input type="checkbox"/> 2 | Incorporated and Principal Place of Business In Another State | <input type="checkbox"/> 5 | <input type="checkbox"/> 5 |
| Citizen or Subject of a Foreign Country | <input type="checkbox"/> 3 | <input type="checkbox"/> 3 | Foreign Nation | <input type="checkbox"/> 6 | <input type="checkbox"/> 6 |

IV. NATURE OF SUIT (Place an "X" in One Box Only)

CONTRACT	TORTS	FORFEITURE/PENALTY	BANKRUPTCY	OTHER STATUTES
<input type="checkbox"/> 110 Insurance <input type="checkbox"/> 120 Marine <input type="checkbox"/> 130 Miller Act <input type="checkbox"/> 140 Negotiable Instrument <input type="checkbox"/> 150 Recovery of Overpayment & Enforcement of Judgment <input type="checkbox"/> 151 Medicare Act <input type="checkbox"/> 152 Recovery of Defaulted Student Loans (Excl. Veterans) <input type="checkbox"/> 153 Recovery of Overpayment of Veteran's Benefits <input type="checkbox"/> 160 Stockholders' Suits <input type="checkbox"/> 190 Other Contract <input type="checkbox"/> 195 Contract Product Liability <input type="checkbox"/> 196 Franchise	PERSONAL INJURY <input type="checkbox"/> 310 Airplane <input type="checkbox"/> 315 Airplane Product Liability <input type="checkbox"/> 320 Assault, Libel & Slander <input type="checkbox"/> 330 Federal Employers' Liability <input type="checkbox"/> 340 Marine <input type="checkbox"/> 345 Marine Product Liability <input type="checkbox"/> 350 Motor Vehicle <input type="checkbox"/> 355 Motor Vehicle Product Liability <input type="checkbox"/> 360 Other Personal Injury	<input type="checkbox"/> 362 Personal Injury—Med. Malpractice <input type="checkbox"/> 365 Personal Injury—Product Liability <input type="checkbox"/> 368 Asbestos Personal Injury Product Liability PERSONAL PROPERTY <input type="checkbox"/> 370 Other Fraud <input type="checkbox"/> 371 Truth in Lending <input type="checkbox"/> 380 Other Personal Property Damage <input type="checkbox"/> 385 Property Damage Product Liability	<input type="checkbox"/> 610 Agriculture <input type="checkbox"/> 620 Other Food & Drug <input type="checkbox"/> 625 Drug Related Seizure of Property 21 USC 881 <input type="checkbox"/> 630 Liquor Laws <input type="checkbox"/> 640 R.R. & Truck <input type="checkbox"/> 650 Airline Regs. <input type="checkbox"/> 660 Occupational Safety/Health <input type="checkbox"/> 690 Other	<input type="checkbox"/> 422 Appeal 28 USC 158 <input type="checkbox"/> 423 Withdrawal 28 USC 157 PROPERTY RIGHTS <input type="checkbox"/> 820 Copyrights <input type="checkbox"/> 830 Patent <input type="checkbox"/> 840 Trademark
REAL PROPERTY <input type="checkbox"/> 210 Land Condemnation <input type="checkbox"/> 220 Foreclosure <input type="checkbox"/> 230 Rent Lease & Ejectment <input type="checkbox"/> 240 Torts to Land <input type="checkbox"/> 245 Tort Product Liability <input type="checkbox"/> 290 All Other Real Property	CIVIL RIGHTS <input type="checkbox"/> 441 Voting <input type="checkbox"/> 442 Employment <input type="checkbox"/> 443 Housing/Accommodations <input type="checkbox"/> 444 Welfare <input type="checkbox"/> 445 Amer. w/Disabilities - Employment <input type="checkbox"/> 446 Amer. w/Disabilities - Other <input type="checkbox"/> 440 Other Civil Rights	PRISONER PETITIONS <input type="checkbox"/> 510 Motions to Vacate Sentence Habeas Corpus: <input type="checkbox"/> 530 General <input type="checkbox"/> 535 Death Penalty <input type="checkbox"/> 540 Mandamus & Other <input type="checkbox"/> 550 Civil Rights <input type="checkbox"/> 555 Prison Condition	LABOR <input type="checkbox"/> 710 Fair Labor Standards Act <input type="checkbox"/> 720 Labor/Mgmt. Relations & Disclosure Act <input type="checkbox"/> 730 Labor/Mgmt. Reporting & Disclosure Act <input type="checkbox"/> 740 Railway Labor Act <input type="checkbox"/> 790 Other Labor Litigation <input type="checkbox"/> 791 Empl. Ret. Inc. Security Act	<input type="checkbox"/> 861 HIA (1395ff) <input type="checkbox"/> 862 Black Lung (923) <input type="checkbox"/> 863 DIWC/DIWW (405(g)) <input type="checkbox"/> 864 SSID Title XVI <input type="checkbox"/> 865 RSI (405(g)) SOCIAL SECURITY <input type="checkbox"/> 870 Taxes (U.S. Plaintiff or Defendant) <input type="checkbox"/> 871 IRS—Third Party 26 USC 7609 FEDERAL TAX SUITS <input type="checkbox"/> 870 Taxes (U.S. Plaintiff or Defendant) <input type="checkbox"/> 871 IRS—Third Party 26 USC 7609
				<input type="checkbox"/> 400 State Reapportionment <input type="checkbox"/> 410 Antitrust <input type="checkbox"/> 430 Banks and Banking <input type="checkbox"/> 450 Commerce <input type="checkbox"/> 460 Deportation <input type="checkbox"/> 470 Racketeer Influenced and Corrupt Organizations <input type="checkbox"/> 480 Consumer Credit <input type="checkbox"/> 490 Cable/Sat TV <input type="checkbox"/> 810 Selective Service <input type="checkbox"/> 850 Securities/Commodities/Exchange <input type="checkbox"/> 875 Customer Challenge 12 USC 3410 <input type="checkbox"/> 890 Other Statutory Actions <input type="checkbox"/> 891 Agricultural Acts <input type="checkbox"/> 892 Economic Stabilization Act <input type="checkbox"/> 893 Environmental Matters <input type="checkbox"/> 894 Energy Allocation Act <input type="checkbox"/> 895 Freedom of Information Act <input type="checkbox"/> 900 Appeal of Fee Determination Under Equal Access to Justice <input type="checkbox"/> 950 Constitutionality of State Statutes

V. ORIGIN

(Place an "X" in One Box Only)

- ☒ 1 Original Proceeding ☐ 2 Removed from State Court ☐ 3 Remanded from Appellate Court ☐ 4 Reinstated or Reopened ☐ 5 Transferred from another district (specify) ☐ 6 Multidistrict Litigation ☐ 7 Appeal to District Judge from Magistrate Judgment

VI. CAUSE OF ACTION

Cite the U.S. Civil Statute under which you are filing (Do not cite jurisdictional statutes unless diversity):

5 U.S.C. Section 552

Brief description of cause:

This case asserts a violation of the Freedom of Information Act

VII. REQUESTED IN COMPLAINT:

☐ CHECK IF THIS IS A CLASS ACTION UNDER F.R.C.P. 23 **DEMAND \$**

CHECK YES only if demanded in complaint:

JURY DEMAND: ☐ Yes ☒ No

VIII. RELATED CASE(S) IF ANY

PLEASE REFER TO CIVIL L.R. 3-12 CONCERNING REQUIREMENT TO FILE "NOTICE OF RELATED CASE". None

IX. DIVISIONAL ASSIGNMENT (CIVIL L.R. 3-2) (PLACE AND "X" IN ONE BOX ONLY)

☒ SAN FRANCISCO/OAKLAND ☐ SAN JOSE

DATE

9/9/08

SIGNATURE OF ATTORNEY OF RECORD

Kristin G. Henry

FILED
 08 SEP -9 PM 1:22
 CLERK U.S. DISTRICT COURT
 NORTHERN DISTRICT OF CALIFORNIA

M 44
 10

KRISTIN HENRY, CAL. BAR NO. 220908
 Sierra Club
 85 2nd Street, 2nd Floor
 San Francisco, CA 94105
 (415) 977-5716
 (415) 977-5793 fax
 Kristin.Henry@sierraclub.org

WILLIAM S. EUBANKS II, N.C. BAR NO. 36743
 HOWARD M. CRYSTAL, D.C. Bar. No. 446189
 Meyer Glitzenstein & Crystal
 1601 Connecticut Avenue, N.W., Suite 700
 Washington, D.C. 20009
 (202) 588-5206
 (202) 588-5049 fax
 hcrystal@meyerglitz.com
 beubanks@meyerglitz.com

Attorneys for Plaintiff Sierra Club

JL

UNITED STATES DISTRICT COURT
 FOR THE NORTHERN DISTRICT OF CALIFORNIA

SIERRA CLUB

Plaintiff,

v.

UNITED STATES DEPARTMENT
 OF AGRICULTURE, AND
 RURAL UTILITIES SERVICE

Defendants.

CV 08

4248

COMPLAINT FOR DECLARATORY
 AND INJUNCTIVE RELIEF

Case No.

1. This is an action under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552 (1966), as amended, challenging the failure of the Rural Utilities Service, an agency within the Department of Agriculture, to lawfully and adequately respond to the Sierra Club's ("Sierra Club" or

COMPLAINT FOR DECLARATORY
 AND INJUNCTIVE RELIEF - 1

SIERRA CLUB
 85 2nd Street, 2nd Floor
 San Francisco, CA 94105
 (415) 977-5716

1 “Plaintiff”) request for records concerning Brazos Electric Cooperative, Inc. (“Brazos”) and RUS’s
2 financial relations with Brazos.

3
4 **JURISDICTION**

5 2. This Court has jurisdiction over this action pursuant to 5 U.S.C. § 552(a)(4)(B).
6 Venue in this district is proper under 28 U.S.C. § 1391(e) because Plaintiff Sierra Club is
7 incorporated in California and maintains its headquarters and resides in this district.

8 **INTRADISTRICT ASSIGNMENT**

9 3. This case is properly assigned to the United States District Court, Northern District of
10 California, San Francisco Division, as the Plaintiff is incorporated in California and resides and
11 maintains its headquarters in San Francisco, California.

12 **PARTIES**

13
14 4. Plaintiff Sierra Club is a national nonprofit organization of approximately 1.3 million
15 members and supporters dedicated to exploring, enjoying, and protecting the wild places of the earth;
16 to practicing and promoting the responsible use of the earth’s ecosystems and resources; to educating
17 and enlisting humanity to protect and restore the quality of the natural and human environment; and
18 to using all lawful means to carry out these objectives.

19
20 5. The Lone Star Chapter of the Sierra Club has approximately 23,000 members in the
21 state of Texas. The Sierra Club’s members live and work in communities in the Waco-Riesel region
22 of Texas where air quality is likely to be adversely impacted by air pollution from coal-fired power
23 plants, including the Sandy Creek Power Plant.

1 6. Since the mid-1990s, the Sierra Club, including its Lone Star Chapter, has been
2 actively involved in, and has expended considerable resources toward, ensuring that all Texas
3 coal-fired plants, including the Sandy Creek Power Plant, are built in compliance with requisite laws.
4 As part of this effort, the Sierra Club routinely makes use of records obtained through Freedom of
5 Information Act requests to ensure that all power plants are built and are operating in compliance
6 with applicable laws and regulations. FOIA records are also used while engaging in educational and
7 First Amendment activities as environmentalists and Sierra Club members. The Sierra Club and its
8 members are therefore harmed by the Rural Utility Service's failure to fully respond to the Sierra
9 Club's FOIA request because that refusal undermines the Sierra Club's ability, and its members'
10 ability, to pursue educational and advocacy measures on behalf of the Sierra Club's members.
11

12
13 7. Defendant United States Department of Agriculture ("USDA") is an agency of the
14 United States, and has custody or control of the records Plaintiff seeks.
15

16 8. Defendant Rural Utilities Service ("RUS") is an agency of the United States
17 Department of Agriculture, and has custody or control of the records Plaintiff seeks.
18

19 **STATUTORY FRAMEWORK AND FACTS GIVING**
20 **RISE TO CAUSE OF ACTION**

21 **THE FREEDOM OF INFORMATION ACT**

22 9. FOIA requires agencies of the federal government, upon request, to search for and
23 release records to the public, unless one of nine specific statutory exemptions applies. 5 U.S.C. §
24 552(b). The exemptions must be narrowly construed. If an exemption applies, the agency is
25

1 required to disclose "any reasonably segregable portion of the record" containing the exempt
2 material. Id.

3 10. Upon receiving a FOIA request, an agency has twenty working days to respond. Id. §
4 552(a)(6)(A). Although the agency may grant itself an extension of ten additional days in "unusual
5 circumstances," FOIA does not permit an agency to delay a response indefinitely. Id. § 552(a)(6)(B).

6 11. Pursuant to 5 U.S.C. § 552(b)(4) ("exemption 4"), records may be exempted from
7 disclosure if they contain "trade secrets and commercial or financial information obtained from a
8 person and [is] privileged or confidential." Thus, certain legitimately confidential records may be
9 lawfully withheld from an agency's FOIA response under exemption 4. Pursuant to 5 U.S.C. §
10 552(b)(5) ("exemption 5"), records may also be exempt from disclosure if they are "inter-agency or
11 intra-agency memorandums or letters that would not be available by law to a party other than an
12 agency in litigation with the agency." Thus, documents generated prior to an agency's decision that
13 reflect a deliberative part of the agency's decision-making process may potentially be lawfully
14 withheld from an agency's FOIA response under exemption 5.

15 12. Under section 552(a)(6), a requestor may appeal an agency's failure to disclose
16 requested records. Id. § 552(a)(6). An agency must make a determination on any such appeal within
17 twenty working days. Id. § 552(a)(6)(A)(ii).

21 FACTUAL BACKGROUND

22 13. On November 20, 2007, Sierra Club filed a FOIA request with RUS for a variety of
23 records related to loans, loan guarantees and grants to Brazos, including loans, guarantees, and grants
24 related to Brazos's member cooperatives and Brazos Sandy Creek Electric ("Brazos Sandy Creek"),
25

1 between fiscal year 2001 and fiscal year 2008. The request also sought any and all records related to
2 involvement of RUS or other arms of the USDA with the proposed coal plant known as Sandy
3 Creek.
4

5 14. RUS did not make a determination on the FOIA request within the twenty working-
6 day time frame required by the FOIA. On March 5, 2008, counsel for Sierra Club contacted RUS to
7 inquire about the status of RUS's action on the FOIA request. Ms. Adrienne Stinnet, FOIA
8 Specialist with RUS, informed counsel that she could not say when a response would be forthcoming
9 to the entire FOIA request, but that the Sierra Club might receive a faster response – probably within
10 a week – if the Sierra Club identified a narrower set of documents for expedited treatment.
11 Accordingly, on March 6, 2008, the Sierra Club wrote to Ms. Stinnett identifying several narrower
12 categories of documents to target for expedited treatment.
13

14 15. In the March 6, 2008 FOIA request, (hereinafter “targeted request”) the Sierra Club
15 requested the following documents:
16

- 17 • Any records prepared or received by RUS since May 1, 2007, related to any
18 requests by [Brazos] for approvals by the government of actions by Brazos
19 related to the Sandy Creek Power Generation facility in McLennan County,
20 TX, including the requests for approval, any comments relevant thereto, and
21 any approvals actually granted.
22
- 23 • Any records prepared or received since May 1, 2007, that relate to or discuss
24 the granting of new loans or loan guarantees to Brazos [including for
25

1 example] records regarding the loan to Brazos of \$199,693,000 announced in
2 a USDA press release on October 26, 2007.

- 3 • Any records prepared or received since May 1, 2007 that relate to or discuss
4 the entity known as Brazos Sandy Creek Electric Cooperative.
5

6 16. On April 24, 2008, RUS provided its final response to the targeted request, releasing
7 some documents with heavy redactions and withholding others. More specifically, the response
8 provided seven documents, three of which contained significant redactions. RUS's cover letter
9 stated that the redacted material and 77 full pages were being withheld pursuant to FOIA exemption
10 4, 5 U.S.C. §552(b)(4), based on RUS's determination that disclosure "is likely to cause substantial
11 harm to the competitive position of the person from whom the information was obtained." RUS's
12 response further stated that an additional twenty-one pages of responsive documents were withheld
13 pursuant to FOIA exemption 5, 5 U.S.C. §552(b)(5), which protects documents that are both
14 deliberative and pre-decisional.
15

16 17. The records that RUS withheld under exemption 4 do not qualify for such an
17 exemption. For example, in a Power Purchase Agreement included in the documents RUS released,
18 RUS withheld under exemption 4 such information as the definitions of "Carrying Costs," "Coal
19 Index," "Commercial Operation Date," "Cost of Coal," and "Operating Standards." Such redacted
20 information is not subject to exemption 4 – among other things, it is contained in documents that
21 Brazos was required to submit to RUS, it is neither confidential nor privileged, and disclosure of the
22 information will not and cannot impair the government's ability to obtain such information in the
23 future.
24
25

1 18. RUS also unlawfully withheld records under exemption 4 that are publicly available
2 elsewhere. For example, RUS heavily redacted a chart that is available on RUS's web site. Among
3 other things, such information is plainly neither confidential nor privileged, and disclosure of the
4 information will not and cannot impair the government's ability to obtain such information in the
5 future.
6

7 19. RUS's withholdings on exemption 5 grounds are similarly unsupported and do not
8 qualify as pre-decisional, deliberative communications. For example, RUS withheld a) information
9 other than deliberative communications among RUS staff members or between RUS and other
10 agencies; b) post-decisional and/or non-deliberative communications; and c) purely factual matters,
11 or factual portions of otherwise deliberative memoranda. RUS applied exemption 5 to
12 communications between RUS and Brazos, and between RUS and other third (non-U.S. government)
13 parties – none of which is subject to exemption 5. See Dep't of Interior v. Klamath Water Users
14 Protective Ass'n, 532 U.S. 1 (2001).
15

16 20. RUS also failed to conduct an adequate search for responsive documents in its
17 custody or control. For example, RUS released a letter stating that "Brazos Electric has been in
18 discussions with RUS regarding acquiring an ownership interest in the Sandy Creek coal-fired 900
19 MW generation facility located near Riesel, McLennan County, Texas ("Sandy Creek Plant")"
20 (emphasis added). Yet the only record provided of discussions prior to June 29, 2007 is of a single
21 meeting on June 14, 2007. RUS also failed, for example, to provide a draft power purchase
22 agreement referenced in the same letter, nor did RUS provide other records that relate to or discuss
23 that agreement.
24
25

1 21. Other records mentioned in the documents that RUS produced were not themselves
2 provided in RUS's FOIA response. These include, for example, documents such as a) "Short Term
3 PPA's"; b) "Economic Analysis of LS Power Transaction"; c) S&P Rating and Fitch Rating; d)
4 Exhibits II and III to a memo about Power Purchase Agreements; and e) an e-mail of June 22, 2007.
5 Similarly, while RUS provided a letter stating that RUS had approved a loan guarantee, no other
6 records related to this loan guarantee were provided. That letter states that advances will be made on
7 a loan only after certain agreements were reached, contracts executed, and supporting information
8 submitted to RUS by Brazos, yet no such documents were provided to the Sierra Club by RUS. The
9 letter further states that "AN8" loan documents would be forwarded to Brazos "in the near future"
10 for execution but no such documents were provided in the FOIA response. Nor were emails
11 provided in RUS's FOIA response.
12

13
14 22. On June 5, 2008, the Sierra Club appealed RUS's partial denial of the Sierra Club's
15 FOIA request. See 5 U.S.C. § 552(a)(6). RUS never responded to the Sierra Club's appeal.
16

17 **PLAINTIFF'S CLAIM FOR RELIEF**

18 23. By failing to search for and provide all responsive records; unlawfully withholding
19 records under exemptions 4 and 5; failing to segregate such records as required to provide non-
20 exempt information; and failing to reply to Plaintiff's appeal, Defendants are in violation of FOIA.
21 Id. § 552(a)(3)(A), (6).
22

23 24. Plaintiff has a right to obtain the requested records.
24
25
26

1 WHEREFORE, Plaintiff prays that the Court:

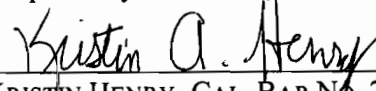
2 (1) Declare that Defendants have violated FOIA by failing to fully and adequately
3 provide records in response to Plaintiff's request, by failing to conduct an adequate search for the
4 documents, and by unlawfully withholding documents under exemptions 4 and 5;

5
6 (2) Order Defendants to make the requested records available to Plaintiff within twenty
7 days;

8 (3) Award Plaintiff its costs and reasonable attorneys' fees in this action; and

9 (4) Grant such other and further relief as the Court may deem just and proper.
10
11

12 Respectfully Submitted,

13 
14 KRISTIN HENRY, CAL. BAR NO. 220908
15 Sierra Club
16 85 2nd Street, 2nd Floor
17 San Francisco, CA 94105
18 (415) 977-5716
19 (415) 977-5793 fax

20 WILLIAM S. EUBANKS II, N.C. BAR NO. 36743
21 HOWARD M. CRYSTAL, D.C. Bar. No. 446189
22 Meyer Glitzenstein & Crystal
23 1601 Connecticut Avenue, N.W., Suite 700
24 Washington, D.C. 20009
25 (202) 588-5206
26 (202) 588-5049 (fax)

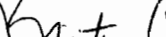
27 *Attorneys for Plaintiff Sierra Club*

28 September 9, 2008

COMPLAINT FOR DECLARATORY
AND INJUNCTIVE RELIEF - 9

SIERRA CLUB
85 2nd Street, 2nd Floor
San Francisco, CA 94105
(415) 977-5716

Pursuant to Civil L.R. 3-16, the undersigned certifies that the following listed persons, associations of persons, firms, partnerships, corporations (including parent corporations) or other entities (i) have a financial interest in the subject matter in controversy or in a party to the controversy, or (ii) have a non-financial interest in that subject matter or in a party that could be materially affected by the outcome of this proceeding: Brazos Electric Cooperative, Inc.


KRISTIN HENRY, CAL. BAR NO. 220908
Sierra Club
85 2nd Street, 2nd Floor
San Francisco, CA 94105
(415) 977-5716
(415) 977-5793 fax
Kristin.Henry@sierraclub.org

WILLIAM S. EUBANKS II, N.C. BAR No. 36743
HOWARD M. CRYSTAL, D.C. Bar. No. 446189
Meyer Glitzenstein & Crystal
1601 Connecticut Avenue, N.W., Suite 700
Washington, D.C. 20009
(202) 588-5206
(202) 588-5049 fax
hcrystal@meyerglitz.com
beubanks@meyerglitz.com

Attorneys for Plaintiff Sierra Club